IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5272 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE J.N.BHATT
and
Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHANTIBEN L CHRISTIAN

Versus

ADMINISTRATIVE OFFICER

Appearance:
MR PC MASTER for Petitioner
MR DEVANG NANAVATI with MR DG SHUKLA
of NANAVATI & NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE J.N.BHATT
and
MR.JUSTICE M.R.CALLA

Date of decision: 04/05/2001

C.A.V. JUDGEMENT

(Per : MR.JUSTICE B.C.PATEL)

#. Learned Single Judge of this Court has referred this matter to a larger bench. Hence this matter is placed before this Bench in view of the order passed by the Honourable the Chief Justice.

#. The petitioner approached this Court by filing the aforesaid petition interalia contending that the petitioner was serving as a Primary Teacher under the respondent Board (Ahmedabad Municipal School Board). The petitioner joined on 8.7.1947 as a primary teacher and retired on 30th November 1982. It is contended that the petitioner was entitled to gratuity under the provisions of Payment of Gratuity Act, 1972 (hereinafter referred to as the Act) on her retirement. She was paid a sum of Rs.9618-25 as per the rules in force at the relevant time. However, the petitioner has claimed that the petitioner was entitled to a larger sum of Rs.19,573-80 under the provisions of the Act and not Rs.9618-25. Since the amount was not paid in full according to the petitioner, an application was made under the Act before the controlling authority, Ahmedabad being application No. 243/83 which was rejected by the Controlling Authority on 2.9.1983 against which an appeal, being appeal No. 28 of 1984 was preferred before the appellate authority, who by judgment and order dated 21.8.1984 remanded the matter to the controlling authority. Ultimately, on remand, the respondent Board was directed to pay balance amount of Rs.9955-55 within thirty days from the date of the order. The respondent preferred an appeal being appeal No. 60 of 1986 before the appellate authority. After hearing the parties, the said appeal was allowed on 8.7.1987 and the judgment and order passed by the Controlling Authority was set aside, vide Annexure 'B'. The order made by the appellate authority is challenged before this Court.

#. In this petition, while examining the contention whether the Institute where the petitioner was serving is amenable to the Act or not, learned Single Judge found it difficult to agree with the view taken by one of us (M.R. Calla, J.) in Special Civil Application No. 13265 of 1993 decided on 17.11.1995 wherein reliance was placed on a decision of Division Bench of this Court in CHARUTAR VIDYA MANDAL vs. SHRI MIRANMIYA REHMUMIYA MALEK reported in 1977 LAB I.C. 1647.

#. It is required to be noted that before the learned Single Judge in Spl. C.A. No. 13265 of 1993, the Institute volunteered to part with a sum of Rs.25,000/in

favour of legal heirs of one of its employees, Kantilal Manilal Shah, who, before his death, had served the Institute for nearly 42 years. Thus, the learned Single Judge was not really called upon to decide whether the Institute was amenable to the provisions contained in the Act or whether the deceased employee was an employee within the meaning of the Act or not. In view of the admission by the parties before the Court, learned Single Judge held that:

> "Be that as it may, the petitioner institution being not amenable to the payment of Gratuity Act, the order passed by the appellate authority under the provisions of Gratuity Act on12.7.93 cannot be sustained in the eye of law and the same is hereby quashed and set aside".

Thus, according to us, the Court in the above matter, was not called upon to decide the question about the applicability of the provisions contained in the Act. On an admission, the order was made, and mere observation made could not have been cited as a precedent before the learned Single Judge before whom the present petition was placed for hearing.

#. In the referring order, learned Single Judge considered the provisions contained in the Bombay Shops & Establishment Act, the decision of a Division Bench of this Court in the case of PORBANDOR NAGAR PALIKA vs. V.G. PATEL CONTROLLING AUTHORITY reported in 16 GLR 963, and the decision of the Apex Court in the case of STATE OF PUNJAB vs. LABOUR COURT, JULLENDER reported in (1980) 1 SCC 4. Learned Single Judge also considered a decision of the Division Bench of this Court in CHARUTAR VIDYA MANDAL vs. SHRI MIRANMIYA REHMUMIYA MALAK reported in 1977 LAB. I.C. 1647 in which the Division Bench held that providing transport service to students so that they could without difficulty of having to waste their time in searching for some transport was a very insignificant part in the scheme of educational system of the petitioner Vidyamandal and it would be unreasonable to lend an industrial colour to this insignificant activity, the principal activity of which was imparting education. It was held that transport service provided was neither an organised industry nor a commercial undertaking so as to come within the sweep or range of section 2 (4) of the Act. The Division Bench pointed out in paragraph 6 of its judgment in which it is stated that applying the tests laid down by the Supreme Court, it is difficult to say that the petitioner Vidya Mandal, by reason of its running a transport service for the convenience of its

students is carrying on a trade, business or profession or it is in connection with, incidental or ancillary to the profession, trade or business with which the Vidya Mandal was concerned. The Division Bench was not called upon to decide the question as to whether teaching is a profession or not. The question in that case was whether in view of the inclusion of "any profession" in the expression "commercial establishment" as defined, an establishment which imparts teaching would be a commercial establishment. However, the question in the instant case to be considered is whether a teacher can be said to be an employee or not. It may be that it is an establishment. Learned Single Judge further opined that the Division Bench in the case of CHARUTAR VIDYA MANDAL (supra) considered the question as to whether by providing a school bus service the society was running a commercial establishment?. Learned Single Judge also considered the decision of the Bombay High Court in the case of PRINCIPAL, BHARATIYA MAHAVIDYALAYA AND ANOTHER vs. SHRI RAMKRISHNA reported in 1994 LAB I.C. 404 where the Bombay High Court held that the petitioner institute, a college imparting education and a society registered under the Societies Registration Act, 1966, fell within the definition of a 'commercial establishment' under the Bombay Shops and Establishment Act and section 1 (3) (b) of the Payment of Gratuity Act will be applicable to it even if an educational institution was ultimately exempted under section 4 from operation of the Bombay Shops & Establishment Act. In view of the aforesaid decisions which the learned Single Judge considered, learned Single Judge expressed an opinion that it would not be appropriate to take a different view of the matter than the view taken by another learned Single Judge in Spl. C.A. No.13265 of 1993, and hence referred the matter to a larger Bench.

#. In the instant case, the real question is: whether the petitioner, who was serving as an employee, i.e. a primary school teacher, was an employee covered by the definition "employee" as found in sub-clause (e) of section 2 of the Act. The said section reads as under:

> 2.(e). "employee" means any person (other than an apprentice) employed on wages, not exceeding two thousands and five hundred rupees per mensem, or such higher amount as the Central Government may, having regards to the general level of wages, by notification specify, in any establishment, factory, mine, oilfield, plantation, railway company or shop, to do any skilled, semi-skilled or unskilled, manual,

supervisory, technical or clerical work, whether the terms of such employment are express or implied, and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.

Explanation: In the case of an employee, who, having been employed for a period of not less than five years on wages not exceeding the amount for the time being specified by or under clause (e) per mensem is employed at any time thereafter on wages exceeding that amount, gratuity, in respect of the period during which such employee was employed on wages not exceeding that amount shall be determined on the basis of the wages received by him during that period."

#. Patna High Court in VED PRAKASH PATHAK NIRALA vs. STATE OF BIHAR AND OTHERS reported in 1999 (3) LLN 369 examined the question about the applicability of section 2 (e) of the Act to a Teacher. In paragraph 5, the Court perused the order of the appellate authority which relied on the decision of the Supreme Court in the case of Bangalore Water Supply and Sewerage Board vs. A. Rajappa reported in 1978 (1) LLN 376 and 657, and came to the conclusion that the teacher is not a workman. In the same paragraph, the Patna High Court held that the question whether teacher is a workman or not has been left open in the decision of the Supreme Court in the case of Bangalore Water Supply (supra) but subsequently in the decision of the Supreme Court in the case of MISS. A. SUNDARAMBAL VS. GOVERNMENT OF GOA, DAMAN AND DIU REPORTED IN 1988 (2) LLN 608, it has been decided after considering the Constitution Bench judgment in case of Bangalore Water Supply and Sewerage Board (supra) that the teacher employed in a school does not fall within the definition of a workman. In paragraph 8 of the judgment, the Patna High Court further pointed out that teacher cannot be said to be an employee under the said Act, as he is not doing any work which can be called as skilled, unskilled, manual work, supervisory work, technical work or clerical work. As teacher is not doing any skilled, semi-skilled, unskilled, manual, supervisory, technical or clerical work as contemplated in sec. 2(e) of the Act, he would not be treated as an employee within the meaning of the said definition and, therefore, he is not entitled to payment of gratuity under the Act. If

teacher is not a workman, he also cannot claim that he is an employee under the said Act.

#. In paragraph 9 of the judgment, the Patna High Court has also considered the decision of the Apex Court in the case of Haryana Unrecognised Schools Association vs. State of Haryana reported in 1996 (2) LLN 271 wherein the Apex Court again held that a teacher, having regard to the nature of his job performed, cannot be held to be an employee even under section 2(1) of the Minimum Wages Act and that of employee under the Payment of Gratuity Act has a very close resemblance. The Patna High Court therefore held that teacher cannot come within the purview of section 2 (e) of the Act.

#. The Bombay High Court, Panaji Bench (Goa) in the case of MISS. A. SUNDARAMBAL VS. GOVERNMENT OF GOA, DAMAN & DIU AND OTHERS REPORTED IN 1983 II LLJ 491 examined the question whether teacher is a workman and can resort to section 2 (s) of the I.D. Act or not. In the case of University of Delhi vs. Ram Nath reported in 1963-II LLJ 335, the Apex Court held that a University like the Delhi University could not be regarded as an industry within the meaning of s.2 (j) of the Industrial Disputes Act. It would necessarily follow that a school or college engaged in the activity of imparting education cannot be regarded as an industry. On analysis of the case reported in 1972 LLJ 590 in case of Burmah Shell Oil Storage & Distributing Co. Ltd. vs. Management Staff Association, in paragraph 9 the Bombay High Court pointed out that a person employed in an industry may be employed in one or the other of the four capacities mentioned in the definition to be covered by the definition of workman. In other words, a person must be employed to do (1) any skilled, semi-skilled or unskilled manual work, (2). any supervisory work, (3). any technical work, (4) any clerical work for hire or reward. In paragraph 6 of Delhi University case, the Apex Court pointed that "education seeks to build up the personality of the pupil by assisting his physical, intellectual, moral and emotional development" and the Supreme Court proceeded to say that "to speak of this educational process in terms of industry sounds so completely incongruous that one is not surprised that the Act has deliberately so defined workmen under S.2(s) to exclude teachers from its scope".

##. In paragraph 14, the Bombay High Court pointed out thus:

"The duties of a teacher are too well known and judicial notice of the same can be easily taken.

Teachers belong to an intellectual class who are trained and qualified to impart education to the students who are, as the word corresponding to student in Indian language shows, seekers of knowledge. The education is imparted in class rooms by means of lectures or tutorials. In technical subjects, practicals are held in the laboratories with the assistance of qualified teachers. Many times teachers are required to take part in extra-curricular activities which are connected with the main function of the educational institution itself. These include organising debates and literary societies. Teachers are also required to conduct examinations in the school or the college and evaluate the answer books of the students. In this process they may be required to do some paper work. They may be required to do, for example, mark the attendance of the students and to submit the progress reports of their wards".

##. In paragraph 16, the Bombay High Court further held that:

"It cannot by any stretch of imagination be said that a teacher is doing skilled or unskilled manual work. Indeed it cannot be said that he is doing any manual work at all. His work, which is essentially intellectual, is directly opposite to manual work which is normally done by a mill operative or even an artisan like carpenter. .... It was sought to be argued with some persistence by Mr. Sonak that while discharging his duties, a teacher is necessarily doing a lot of manual work such as, for example, examining the paper, writing on the black board, taking down the attendance of the students etc. We do not see how the items of work enumerated by Mr. Sonak can be said to change the character of a teacher which is essentially intellectual. If the nature of work, which Mr. Sonak mentions, is being done by a teacher, it is only incidentally and not mainly or predominantly."

##. In paragraph 28 of the judgment, the Division Bench also considered a decision rendered by Kerala High Court in Venketaraman vs. Labour Court, Ernakulam reported in 1982 (1) LLB 454, wherein after a detailed analysis of section 2(s) of the I.D. Act and considering the nature of the work done by the teachers, the Kerala High Court held, that the work of a teacher does not pertain to the

work mentioned in section 2 (s) of the I.D. Act. The Division Bench opined that the Kerala High Court has laid down the law correctly.

##. The aforesaid decision of the Kerala High Court was challenged before the Division Bench and the Division Bench of Kerala High Court which is reported in case of KARTHI YAYANI & ORS. VS. UNION OF INDIA (1984 II LLJ 259). After considering several decisions, the Division Bench, in paragraph 28 confirmed the conclusion that the teacher is not workman since work of teacher does not partake of the nature of the work mentioned in S.2(s) of the Act, since the work of teaching is not skilled or unskilled manual work.

##. The case of Miss. A Sundarambal was taken to the Apex Court, and the decision of the Apex Court is reported in AIR 1988 SC 1700. In paragraph 8, the Apex Court held as under:

"In order to be a workman, a person should be one who satisfies the following conditions: (i). he should be a person employed in an industry for hire or reward; (ii). he should be engaged in skilled or unskilled manual, supervisory, technical or clerical work; and, (iii). he should not be a person falling under any of the four clauses, i.e. (i) to (iv) mentioned in the definition of 'workman' in section 2 (s) of the Act. The definition also provides that a workman employed in an industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, an industrial dispute, or whose dismissal, discharge or retrenchment has led to that dispute."

##. In paragraph 9, the Court examined the question which arose before the Court for consideration whether a teacher in a school falls under any of the four categories, viz. a person doing any skilled, semi-skilled or unskilled manual work supervisory work, technical work or clerical work. If he does not satisfy any one of the above descriptions he would not be a workman even though he is an employee of an industry as settled by the Apex Court in May and Baker (India) Ltd. vs. Their Workmen (1961) 2 Lab LJ 94 : (AIR 1967 SC 678) wherein the Court considered the question whether a person employed by a pharmaceutical firm as a

representative (for canvassing orders) whose duties consisted mainly of canvassing orders and any clerical or manual work that he had to do was only incidental to his main work of canvassing, could be considered as a workman as defined in the Act. Dealing with the said question, the Court pointed out (at pp. 679-80 of AIR):

> "A 'workman' was then defined as any person employed in any industry to do any skilled or unskilled manual or clerical work for hire or reward. Therefore, doing manual or clerical work was necessary before a person could be called a workman. This definition came for consideration before industrial tribunals and it was consistently held that the designation of the employee was not of great moment and what was of importance was the nature of his duties. If the nature of the duties is manual or clerical, then the person must be held to be a workman. On the other hand, if manual or clerical work is only a small part of the duties of the person concerned and incidental to his main work which is not manual or clerical, then such a person would not be a workman. It has, therefore, to be seen in each case from the nature of the duties whether a person employed is a workman or not, under the definition of that word as it existed before the amendment of 1956. The nature of the duties of Mukerjee is not in dispute in this case and the only question therefore is whether looking to the nature of the duties it can be said that Mukerjee was a workman within the meaning of S.2(s) as it stood at the relevant time. We find from the nature of the duties assigned to Mukerjee that his main work was that of canvassing and any clerical or manual work that he had to do was incidental to his main work of canvassing and could not take more than a small fraction of the time for which he had to work. In the circumstances the tribunal's conclusion that Mukerjee was a workman is incorrect. The tribunal seems to have been led away by the fact that Mukerjee had no supervisory duties and had to work under the directions of his superior officers. That, however, would not necessarily mean that Mukerjee's duties were mainly manual or clerical. From what the tribunal itself has found it is clear that Mukerjee's duties were mainly neither clerical nor manual. Therefore, as Mukerjee was not a workman, his case would not be covered by the Industrial Disputes Act and the

tribunal would have no jurisdiction to order his reinstatement. We, therefore, set aside the order of the tribunal directing reinstatement of Mukerjee along with other reliefs."

##. In paragraph 10, the Court pointed out as under, about a teacher in a school:

"We are of the view that the teachers employed by educational institutions whether the said institutions are imparting primary, secondary, graduate or post-graduate education cannot be called as 'workmen' within the meaning of section 2(s) of the Act. Imparting of education which is the main function of teachers cannot be considered as skilled or unskilled manual work or supervisory work or technical work or clerical work. Imparting of education is in the nature of a mission or a noble vocation. A teacher educates children, he moulds their character, builds up their personality and makes them fit to become responsible citizens. Children grow under the care of teachers. The clerical work, if any they may do, is only incidental to their principal work of teaching. We agree with the reasons given by the High Court for taking the view that teachers cannot be treated as 'workmen' as defined under the Act. it is not possible to accept the suggestion that having regard to the object of the Act, all employees in an industry except those falling under the four exceptions (i) to (iv) in section 2 (s) of the Act should be treated as workmen. The acceptance of this arguments will render the words 'to do any skilled or unskilled manual, supervisory, technical or clerical work' meaningless. A liberal construction as suggested would have been possible only in the absence of these words. The decision in May and Baker (India) Ltd. v. Their Workman (AIR 1967 SC 678) (supra) precludes us from taking such a view. We, therefore, hold. that the High Court was right in holding that the appellant was not a 'workman' though the school was an industry in view of the definition of 'workman' as it now stands".

##. Before the Apex Court in the case of HARYANA UNRECOGNISED SCHOOLS ASSOCIATION vs. STATE OF HARYANA reported in 1996 (2) LLN 271, a question arose for consideration whether teachers of an educational

institution can be held to be employee under section 2(i) of the Minimum Wages Act, 1948 to enable the Government to fix their Minimum Wages. The Government of Haryana in exercise of powers conferred under section 27 of the Minimum Wages Act added in Part I of the schedule, item (40) describing "employment in private coaching classes, schools, including nursery schools and technical institutions', for the purpose of fixing minimum rate of wages for the employees therein. Minimum rate of wages in respect of the different categories of employees serving in such schools were fixed which were challenged and the subject matter of that notification was before the High Court on the ground that teachers of educational institutions cannot come within the purview of the Act since they are not workmen within the meaning of the Industrial Disputes Act nor would they be employees under s. 2(i) of the Minimum Wages Act. The petition was dismissed by the High Court on the ground that the power of the State Government to add any employment to the schedule under S. 27 of the Minimum Wages Act is without any fetter and further the appropriate Government has tried to mitigate the sufferings and exploitation of the educated trained/untrained teachers at the hands of the managements/employers of the private educational institutions and S. 5 of the Minimum Wages Act gives large powers to the appropriate government. The Apex Court pointed out in paragraph 8 that:

"There cannot be any dispute with the proposition that while construing the provisions of a statute like the Minimum Wages Act a beneficial interpretation has to be preferred which advances the object of the Act. But nevertheless it has to be borne in mind that the beneficial interpretations should relate only to those employments which are intended to be covered by the Act, and not to others."

##. At this stage, it would be appropriate to refer to the expression 'employee' as defined in section 2 (i) of the Minimum Wages Act, which reads as under:

" 'employee' means any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical, in a scheduled employment in respect of which minimum rates of wages have been fixed, and includes an out-worker to whom any articles or materials are given out by another persons to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the

purposes of the trade or business of that other person where the process is to be carried out either in the home of the out-worker or in some other premises not being premises under the control and management of that other person; and also includes an employee declared to be an employee by the appropriate Government, but does not include any member of the armed forces of the Union."

In paragraph 10, the Apex Court pointed out that:

"since the teachers of an educational institution are not employed to do any skilled or unskilled or manual or clerical work, and, therefore, could not be held to be an employee under s.2(i) of the Act, it is beyond the competence of the State Government to bring them under the purview of the Act by adding the employment in educational institution in the schedule in exercise of the power under S. 27 of the Act."

##. The Apex Court also referred to the decision of Miss. A Sunderambal (supra) and reiterated that applying the dictum to the definition of "employee" under s. 2(i) of the Minimum Wages Act, it may be held that a teacher would not come within the said definition.

##. Reading the definition of the term 'employee' as found in s. 2(e) of the Payment of Gratuity Act, s.2(s) of the Industrial Disputes Act and s.2(i) of the Minimum Wages Act, it is very clear that in all the aforesaid sections, the definition of the word 'employee' is extended only to a limited class, and if a person not engaged to do any skilled, semi skilled or unskilled manual, supervisory, technical or clerical work, it cannot be said that the person is covered by the definition of employee as required to be understood under the Act. The language of the Minimum Wages Act is perimateria to the provisions contained in Payment of Gratuity Act insofar as it relates to definition of 'employee', and, as the Apex Court held that teachers are not employed to do any skilled or unskilled manual work, and, therefore, in our opinion, the same will equally apply with the same force under the provisions of Payment of Gratuity Act. It is not the case in the petition that the petitioner was discharging duties other than that of teaching. The work of a teacher cannot be said to be supervisory, technical or clerical. As pointed by the Apex Court in the case of Miss. Sunderambal (supra) imparting of education is the main function of teachers,

and that cannot be considered as a skilled or unskilled manual work or supervisory work or technical work or clerical work. Thus, a conjoint reading of the definitions given in the various Acts referred to hereinabove and the principles laid down in the case of A. Sunderambal and Haryana Unrecognised Schools Association (supra), it is required to be held that teacher would not come within the definition of 'employee' for the purpose of Payment of Gratuity Act.

##. On behalf of the respondent, it was submitted that while considering the provisions contained under the Act, the learned Single Judge considered the words 'establishment' and 'commercial establishment'. Learned Single Judge also observed that if the word 'profession' occurring in the definitions of the aforesaid words is to be construed in its normal meaning, then, obviously, teaching profession would be a profession and therefore, there should be no difficulty in construing that a teaching institution can be a commercial establishment within the meaning of that expression as defined in sub-section (4) of section 2 of the Bombay Shops and Establishments Act. Learned Single Judge also considered the case of PORBANDAR NAGAR PALIKA (supra) wherein it was held that various sections of establishment of the Municipality were commercial establishments within the meaning of sub-section (4) of section 2 of the Bombay Shops and Establishments Act. Learned Single Judge also held that teaching would be a profession. Learned Single Judge further held that the word 'profession' occurs even in Article 19 (1) (g) of the Constitution of India which guarantees all citizens the right to practise any profession, or to carry on any occupation or business. The learned Single Judge, while referring the matter expressed an opinion that if organised teaching by an establishment is a profession, then, there is no reason why the benefit of the provisions of the Payment of Gratuity Act should not be extended to the employees of such establishment, which in the present case, would be a local authority which imparts education through its school board. In view of these expressions of the learned Single Judge for referring the matter to a larger Bench, learned counsel appearing for the respondent Corporation submitted before us that the view expressed by the learned Single Judge is not in consonance with the views expressed by the Apex Court in the case of UNNI KRISHNAN VS. STATE OF A.P. reported in 1993 (1) SCC 645.

Article 19 (1) (g) reads as under:-

"All citizens have the right -
(a) to (f). xxx xxx xxx
(g). to practise any profession, or to carry on any occupation, trade or business."

In UNNI KRISHNAN's (supra) case, the Apex Court pointed out as under in paragraph 202:

"We are also of the opinion that the said activity cannot be called a 'profession' within the meaning of Article 19(1)(g). It is significant to notice the words 'to practice any profession'. Evidently, the reference is to such profession as may be practiced by citizens i.e. individuals (See National Union of Commercial Employees v. M.R. Meher, Industrial Tribunal). Establishing educational institution can by no stretch of imagination be treated as 'practising any profession'. Teaching may be a profession but establishing an institution, employing teaching and non-teaching staff, procuring the necessary infrastructure for running a school or college is not 'practising profession'. It may be anything but not practising profession. We must make it clear that we have not gone into the precise meaning and content of the expressions profession, occupation trade or business for the reason that it is not necessary for us to do so in view of the approach we are adopting hereinafter, which would be evident from the succeeding paragraphs. Our main concern in the entire preceding discussionis only to establish that the activity of establishment and/or running an educational institution cannot be a matter of commerce."

##. In paragraph 63, the Apex Court pointed out as under:

"In each of these cases, depending upon the statute, either "occupation" or "business" has come to be defined. Certainly, it cannot be contended that establishment of an educational institution would be "business". Nor again, could that be called trade since no trading activities are carried on. Equally, it is not a profession. It is one thing to say that teaching is a profession but it is totally different thing to urge that establishment of an educational institution would be a profession. it may perhaps fall under the category of occupation

provided no recognition is sought from the State or affiliation from the University is asked on the basis that it is a fundamental right. ... "

##. Thus, the view expressed by the learned Single Judge that teaching is a profession and therefore would come within the meaning of commercial establishment so as to attract the provisions contained in the payment of Gratuity Act cannot be accepted. The word 'establishment' may cover the institute but teachers cannot be considered as employees for the purpose of Payment of Gratutity Act.

##. Learned advocate Mr. Master appearing for the petitioner placed strong reliance on the decision of the Bombay High Court in the case of P.D. RAODEO vs. PRINCIPAL, ST. PHELOMINE'S CONVENT HIGH SCHOOL reported in 1997 (1) LLN 608 wherein a Division Bench of the Bombay High Court considered the provisions contained in the Payment of Gratuity Act. The Bombay High Court pointed out that the provisions of the Payment of Gratuity Act applied to every shop or establishment in which ten or more persons are employed or were employed on any day of the preceding twelve months. After considering the decision in the case of A. SUNDERAMBAL (supra), the Bombay High Court, in paragraph 13 expressed an opinion that:

"... if the construction of the word 'employee' was required to be made with reference to the scheme of the object of the Act, it cannot be gainsaid that the object of the Act is to provide for a scheme for the payment of gratuity to certain categories of employees engaged in certain specified types of concerns. The gratuity is, in its essence, a payment in consideration of past services paid only at the end of the said service when the employment terminates. The definition of 'employee' is wide enough to include a teacher indulging in teaching activities in an educational institute, which in our view would be clearly covered by the definition of establishment."

##. In the case before the Bombay High Court, the petitioner was employed as a teacher in a primary school, which was an unaided school. It is required to be noted that while examining the provisions contained in the Minimum Wages Act, the Apex Court in the case of HARYANA UNRECOGNISED SCHOOL ASSN (supra), the Court was considering a welfare legislation. The Court pointed

that the beneficial interpretation is to be preferred which advances the object of the Act. In that view of the matter, it has to be borne in mind that beneficial interpretation would cover only employees who are intended to be covered by the Act. Therefore, in our opinion, the decision in the case of P.D. RAODEO (supra) does not lay down the correct law and the views expressed in the said judgment are not in consonance with the views expressed by the Apex Court in the Case of A Sunderambal (supra) and Haryana Unrecognised Schools Association (supra). In our view, this decision is, therefore, of no assistance to the petitioner.

##. In our opinion, the decision in the case of A Sunderambal refers to the position of a teacher qua an educational establishment and the decision is in respect of a workman in relation to an industry. In our opinion, in the case before us, the Court is required to consider the language used to cover the nature of services indicated in the word "employee" in the said case and the language used in the present statute to cover the nature of services indicated in the word employee. Similarly the word "employee" considered and interpreted by the Apex Court in the case of Haryana Unrecognised School Association while considering a labour welfare legislation, is also required to be considered for deciding the present case.

##. In the instant case, one more aspect is required to be borne in mind that the School Board had its own scheme for payment of gratuity, and as per the scheme, whatever amount required to be paid by the Board was paid to the teacher.

##. Learned advocate for the petitioner placed reliance on the decision of the Rajasthan High Court in the case of RAMGOPAL vs. MAHESH SHIKSHAN SANSTHAN & ORS (S.B.C. W.P. No. 2779 of 1992 decided on March 14, 1996). Learned Single Judge of the Rajasthan High Court held that the view taken by the appellate authority that the respondent No.1 Institute may be an establishment but unless it is held to be commercial establishment under the Rajasthan Shops & Commercial Establishments Act 1958 it will not come within the ambit of payment of Gratuity Act, 1972, is wholly unsustainable. In our opinion, it is required to be noted that even if the institution is held to be a commercial establishment, benefit can be extended to the persons only if they fall within the definition of the categories as defined in sec. 2(e) of the Act so as to cover them as "employees". Learned Single Judge of the Rajasthan High Court has nowhere

considered whether a teacher would be an employee within section 2 (e) of the Payment of Gratuity Act or not, and, therefore, this judgment is of no assistance to the petitioner.

##. This Court is not called upon to decide the nature of establishment and whether an establishment as defined in the provisions contained in the Bombay Shops & Establishment Act alone would be required to be taken into consideration. The Court is called upon to decide the issue whether a teacher, in view of the nature of duties being discharged, can be said to be an employee as defined in section 2(e) of the Act or not. In view of the clear meaning and the interpretation of the word 'employee' as found in different statutes which we have referred to hereinabove, it is not necessary for us to consider other aspects. In view of what is stated hereinabove, the petitioner cannot be said to be an employee as defined under sec. 2(e) of the Payment of Gratuity Act.

The petition is rejected. Rule is discharged.
No order as to costs.

csm./ (B.C. PATEL, J.)

(Per J.N. Bhatt, J.)

1. While respectfully expressing my complete agreement with the erudite and impressive reasons and conclusion reached by my learned brother, B.C. Patel, J., I, however, deem it expedient, to add one more dimension, factual position and reason to strengthen his conclusion.

2. In the case on hand, it is evident, that petitioner was working as an Assistant Teacher in the Primary School run by Municipal School Board. Petitioner had moved the Controlling Authority under the Act of 1972 by giving an application, No. 240 of 1983 contending that she is entitled to larger amount of gratuity under the provisions of "Payment of Gratuity Act, 1972" (Act No. 39 of 1972) (P.G.-Act) over and above the amount of Rs. 9618.25 ps paid by respondent-authority on her retirement as per the rules of the Corporation-respondent, Board. My learned brother, Patel, J., has lucidly articulated other factual details and semantic exposition of case-law in the judgment written by him and, therefore, it would not be necessary to reiterate the factual and case-law profile.

3. Let us have a look into the statutory mechanism under

which the respondent-authority had paid and petitioner had received the amount of Rs. 9618.25 ps as per the rules of the Board against her claim of Rs. 19,573.80ps under the P.G. Act. Ahmedabad Municipal Corporation has framed regulations determining the conditions under which the officers, servants and employees of the Corporation on retirement are entitled to receive pensions, gratuity, compassionate allowance, etc. The Regulations are framed by the Corporation under Sec. 465 (1) (h) of the Bombay Provincial Municipal Corporation Act, 1949 (B.P.M.C. Act). These regulations are known and called as "The Gratuity Regulations of the Municipal Corporation of the City of Ahmedabad." They are, also, forming part of regulations contained in Chapter IX of Ahmedabad Municipal Corporation Manual Vol. III, with amendment from time to time under the sanction and approval of the appropriate Government. The copy of such regulations is placed, at page No. 129, in the original file forming part of Records and Proceedings of Reference, No. 121 of 1967, of Industrial Court, Gujarat, Ahmedabad, which we had called from the Registry of the said Court.

4. Section 465 of the B.P.M.C. Act provides for regulations. It would be necessary to refer the relevant material provision. Section 465 (1) (h) reads as under;

> 465. Regulations
>
> (1) The Standing Committee shall from time to time frame regulations not inconsistent with this Act and the rules but in consonance with any resolution that may be passed by the Corporation.
>
> (a) to (g) xxx xxx xxx
>
> (h) determining the conditions under which the said officers and servants, or any of them, shall on retirement or discharge receive pensions, gratuities or compassionate allowances, and under which the surviving spouse or children and, in the absence of the surviving spouse or children, the parents, brothers and sisters, if any, dependent on any of the said officers and servants, shall, after their death, receive compassionate allowances and the amounts of such pensions, gratuities or compassionate allowances;
>
> (i) to (l) xxx xxx xxx

5. It will be, also, interesting and expedient to refer the relevant provisions from Chapter XI of the Bombay Primary Education Act, 1947 (B.P.E. Act). It came into force on 19th January, 1948, and it is applicable to the State of Gujarat by the adoption of Laws Orders, 1950. The design and desideratum of B.P.E. Act is to provide for compulsory primary education and to make better provisions for the management and control of the primary education in the State. In view of the preambular promise and constitutional provisions, it is the duty of the Government to secure the development and expansion of primary education and it has been the declared policy of the Government that universal, free and compulsory primary education should be reached by definite programme of progressive expansion, and, whereas, it is expedient to make better provisions for the development, expansion, management and control of primary education in the State, the B.P.E. Act, is enacted to achieve such policy and goals by the State.

6. It is in this context that Sec. 60 in Chapter IX of B.P.E. Act provides for delegation of powers and duties, under the Act or the rules thereunder, to any officer or authority subordinate to it. Sec. 61 provides for power to make the rules. The State Government may, by notification in the official gazette, make rules for carrying out the purposes of this Act.

7. Sec. 63 reads as under:

(1) The State Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing provision such rules may be made for all or any of the following matters:-

(a) the manner of election of the chairman, vice-chairman and the members of a school board;

(b) the duties and functions of the chairman and the vice-chairman;

(c) procedure for the conduct of school board's business and school committees for non-authorised municipalities;

(d) procedure for sanctioning tenders;

(e) the constitution and functions of village school committees;

(ee) provident funds, gratuities and pensions for the primary school teachers maintained by an authorized municipality;

(f) the rates of subscriptions and contributions and other conditions of the provident fund established for the staff maintained by district school boards;

(fa) the conditions of gratuities and pensions for the staff referred to in clause (f);

(g) provision for the welfare of the children attending primary school including provisions for the care of their health and for the physical and moral training;

(h) pre-vocational courses as a part of upper primary courses;

(i) regulation of the delegation of powers, duties and functions under this Act; and

(j) matters to be prescribed under this Act.

(3) Rules made under sub-sections (1) and (2) shall be made after previous publications.

(4) All rules made under this Act shall be laid for not less than thirty days before the State Legislature as soon as possible after they are made and shall be subject to such modifications as the State Legislature may make during the session in which they are so laid or the session immediately following. The modifications so made shall be published in the Official Gazette and shall thereupon take effect.

11. It could very well be visualised from clause (a) to (h) of sub-section (2) of Sec. 63 that the legislature has given wide powers to the State Government to make rules in relation of advancing the cause of primary education in the State.

12. The Bombay Primary Education Rules, 1949 (B.P.E. Rules) are framed under the B.P.E. Act, which are applicable to the State of Gujarat and which came into force w.e.f. 1st April, 1949. Rule 196 of the B.P.E. Rules makes a provision as to how the amount of pension and gratuities of Primary School Teachers, maintained by an authorised Municipality, should be determined. The determination of pension and gratuities are required to be done in accordance with the rules prescribed from time to time by the Government for similar classes and its employees. Rule 196 is very important for the purpose of issue in focus about the applicability of P.G. Act,

1972. Rule 196 reads as under:

196. Determination of pension and gratuities-

(1) The grant of pensions and gratuities to the members of the staff maintained by a District School Board and to primary school teachers maintained by an Authorised Municipality shall be determined in accordance with the rules prescribed from time to time by Government for similar classes of its employees.

(2) In particular and without prejudice to the generality of the provisions of sub-rule (1), the grant of pensions and gratuities to the members of the staff of a District School Board and to primary school teachers of an Authorised Municipality shall be determined as follows:-

(a) Every guaranteed teacher shall be, eligible for pension or gratuity according to the rules in force in Government Education Department on the date of his retirement unless he has exercised the option, within the prescribed period, of remaining under the old rules to which he was previously subject:

Provided that such of the guaranteed teachers as have under sub-rule (3) or (4) of rule 5 of the Bombay Primary Education Rules, 1924, or under sub-rule (3) of rule 193 of these rules exercised the option of joining the provident fund, in lieu of pension shall, from and after the date of their admission to the provident fund, be entitled to the benefit of such pension and provident fund, as provided in clause (c):

Provided further that such of the said teachers as have not elected to join the provident fund established by the District School Board or Authorised Municipality shall be entitled to receive such pension (e.g., retiring superannuation, etc.) as is admissible under the rules and as may be certified by the Accountant General. The amount of such pension payable by Government and the District School Board or Authorised Municipality concerned shall be

determined in accordance with the method indicated in Articles 45 and 799 of the Civil Service Regulations and Rule 279-B of the Bombay Civil Services Rules, as the case may be. The amount of such pension payable by the District School Board or Authorised Municipality shall be drawn by them from the Primary Education Fund of the District School Board or Authorised Municipality concerned, the amount payable by Government being drawn from the Consolidated Fund of the State.

(b) Non-guaranteed teachers in the employ of a District School Board or Authorised Municipality and members of the non-teaching staff in the employ of a District School Board for whom only pension fund was established by such District Board or Authorised Municipality and who, under sub-Rule (3) of Rule 193, have exercised the option to remain on a pensionary basis, shall on retirement be entitled to receive such pension (e.g. retiring superannuation, etc.) as is admissible under the rules and as may be certified by the Accountant-General. The District School Board or Authorised Municipality concerned may make such reduction in the admissible pension as it thinks fit, if the employee in its option, is not quite satisfactory;

(c) The guaranteed teachers who have exercised the option of joining the provident fund in lieu of pension, and members of the District School Board staff other than guaranteed teachers and non-guaranteed teachers of an authorised municipality who were employed on a pensionary basis but who subsequently have exercised the option of joining the provident fund in lieu of pension shall be entitled-

(i) to such pension or gratuity payable on retirement from the service of the District School Board or Authorised Municipality as they would have been entitled to the provident fund, the amount of such pension or gratuity, being based on the emolument drawn immediately prior to the date of their joining the provident fund. The amount of such pension payable by Government and/or the

District School Board or Authorised Municipality shall be determined in accordance with the method indicated in Articles 45 and 779 of the Civil Service Regulations or rule 279-B of the Bombay Civil Services Rules as the case may be. The amount of such pension payable by the District School Board or Authorised Municipality shall be drawn by them from the Primary Education fund of the District School Board or Authorised Municipality concerned. The amount payable by Government being drawn from the Consolidated Fund of the State;

(ii) to such further sum from the District School Board or Authorised Municipality to be payable on retirement from its service as may stand their credit in the books of the Provident Fund, subject, however, to the conditions laid down in Schedule M to these rules.

Note-The staff referred to in clause (c) above shall retire or be permitted to retire from service of the District School Board or Authorised Municipality in accordance with the pension rules in the Bombay Civil Services Rules Manual and, for this purpose, their services after joining the provident fund shall be taken into account. Those who are required to retire on the ground of inefficiency and whose total period of service including service rendered after joining the provident fund is less than that specified in Rule 254 (2) of the Bombay Civil Service Rules. In the case of guaranteed teachers who have elected to remain under the old pension rules, the grant of such pension shall be made subject to the provisions of Article 353 of the Civil Service Regulations.

(3) Notwithstanding anything contained in this rule the grant of gratuities to primary school teachers maintained by an authorised municipality may be determined in accordance with such rules as the authorised municipality may, with the previous approval of the State Government, frame in that behalf.

13. There is no dispute about the fact that pursuant to I.T. reference, No. 121 of 67, the award has been declared by the Industrial Tribunal in relation to the dispute about single demand regarding gratuity only,

which was preceded by 1953, Award. The Gratuity Scheme for the workman of Ahmedabad Municipal Corporation (including Primary Teachers) was made by the Industrial Tribunal on 28th April, 1972. Ahmedabad Municipal Corporation has been submitting, and revising the Scheme of Gratuity from time to time under approval of the Government. The Scheme of Gratuity settled by the Labour Appellate Tribunal has been revised from time to time to make it more liberal. The latest revision has taken place by an agreement on 07-07-1970 as reported to us, as a result of which there has been further merger of Dearness Allowance into Basic Salary for the purpose of salary. We were not enlighted about revision of scheme thereafter.

14. There is, also, interesting history of the Scheme of Gratuity so far as the workman of the Corporation are concerned. It was revised in appeal by the Labour Appellate Tribunal. In exercise of the statutory powers in relation to the Gratuity Scheme, the Standing Committee of the Corporation has, also, passed Resolutions from time to time in this behalf. The Government of Gujarat has, also, accorded sanction for the Scheme of Gratuity and the regulations as stated hereinbefore.

15. 'Gratuity' in its etymological sense is 'a gift, especially for services rendered, or return for favours received.' The general principle underlining the Scheme is that by their length of service, employees and workmen are entitled to claim certain amount as retiral benefit. It is the proposition that gratuity has to be considered to be the amount paid unconnected with any consideration and not resting upon it, and has to be considered as something given freely, voluntarily or without recompense. Needless to say that the more length of services carries with it an expectation of appreciation for the employer and financial assistance to tide over post-retiral hardships and inconvenience. The main purpose and the concept of gratuity is to help the workman after retirement, whether, retirement is a result of rules of superannuation, or physical disablement or impairment of vital part of the body. The expression, 'gratuity' itself suggests as 'a gratuitious payment' given to an employee on discharge, superannuation or death.

16. Since this petition is being disposed of only on the sole question about petitioner, who is a teacher, being not an "employee" and, therefore, being not covered under the P.G. Act, and questions of applicability of the Act

as such and in the alternative interpretation of the amended portion of clause 'e' of Sec. 2, which reads, "but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any Rules providing for payment of gratuity", and sub-section (5) of Sec. 4, of the P.G. Act, 1972, have not been gone into and, therefore, they are kept open in this reference. Those questions, obviously, therefore, would not require any discussion on merits.

17. With the above addition to the perceptions of my learned brother, B.C. Patel, J., I gratefully and respectfully agree with his reasons and opinion. As directed by him, this petition shall, obviously, stand rejected without any order as to costs.

[J.N. BHATT, J.]

PER CALLA, J.

I respectfully agree with the elaborate reasons and conclusions arrived at by my learned brother B.C. Patel, J. I also agree with the erudite and lucid addition made thereto by my learned brother J.N. Bhatt, J. In the result, the petition stands rejected with no order as to costs.

(M.R. CALLA, J.)

In the result, the petition is rejected. Rule is discharged. No order as to costs.

(B.C. PATEL, J.)
(J.N. BHATT, J.)
(M.R. CALLA, J.)